BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

A. INTRODUCTION

In support of the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Judicial Circuit, petitioner presents the following argument:

The opinion of the court below was *per curiam*. The questions of law presented by petitioner were not mentioned in the opinion. A bald affirmation of the findings of facts made by the Board was set forth. The court itself did not express an opinion whether an employee's suspicion of surveillance by an employer was legally sufficient to support a finding of an unfair labor practice. It did not say that a mere expression of dislike for organization of any trade was an unfair labor practice. That unsuccessful and ineffective suggestions to employees by an employer were acts of company domination was not expressly decided. That an expression by an employer that he was not in favor of organization, unaccompanied by any threats and further action, was an expression of opinion not encompassed within the intendment of the First Amendment to the Constitution was not expressly determined by the court. Nor did the court state whether a mere inference by the Board that a discharge was discriminatory was legally sufficient to impeach the direct testimony of the employer that the discharge was for a failure to report to work according to his reinstatement agreement and within a reasonable time

after the date set by the said agreement for returning to work and that union activity was not the basis or reason for the discharge.

The decision, therefore, must be considered as having adopted the findings of fact and conclusions of law made by the Board. Thus considered, the court has tacitly decided that a mere expression of dislike for organization of any trade unaccompanied by any threats or further action is an unfair labor practice and not protected by the First Amendment. The court has further decided that ineffective and unsuccessful suggestions to employees constitute coercion and aid in the formation and administration of an organization, even though it is shown by the evidence that no coercion in fact existed. The court has likewise approved the principle that a mere inference stated by the Board that a discharge is discriminatory is sufficient to impeach the sworn testimony of the employer that the discharge was made because of a failure to report to work pursuant to and in accordance with the reinstatement agreement and within a reasonable time after the date set for return to work. The court has decided that an employer, when presented with conflicting claims of majority representation, is bound to choose at its peril one of the organizations, and should he choose the one later found by the Board after considering evidence produced at a hearing not to be the bargaining representative, or should he choose neither and petition the Board to determine which is the proper representative, then he is guilty of an unfair labor practice. The determination of the issues in this manner establishes the following results:

1. The decision is in conflict with decisions of other circuit courts of appeals.

2. The decision effectively abridges the rights guaranteed by the Fifth Amendment by depriving an employer of liberty without due process of law.

3. The decision deprives an employer of his right of free speech guaranteed by the First Amendment.

4. The decision is in conflict with the fundamental purpose of the Act.

B. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS

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1. THE DECISION OF THE COURT BELOW IN HOLDING THAT SUGGESTIONS OF OPINION OF AN EMPLOYER WERE SUFFICIENT EVIDENCE OF COMPANY DOMINATION, ALTHOUGH THE EVIDENCE CLEARLY SHOWS THAT THERE WAS NO INFLUENCE OR COERCION EFFECTED, IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *HUMBLE OIL CO. v. N.L.R.B.*, 113 F. (2d) 85 (C.C.A. 5th, 1940) AND THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *N.L.R.B. v. A. S. ABELL CO.*, 97 F. (2d) 951 (C.C.A. 4th, 1938)

Review of the evidence is necessary to show that there is none which supports a finding that any member was coerced or that the Association was company dominated, either in its formation or its administration.

Particularly important is the fact that none other than Brotherhood members testified to facts and events which tended to prove coercion and company domination of the Association.

Employer action prohibited by Section 8(1) of the Act may be any act done or word spoken by an employer or

his supervisory employees in the course and scope of their authority and duties relating to matters which the Act contemplates are of no concern to the employer. It may be said that a violation of Section 8(2) is a violation of Section 8(1), but it has been judicially determined that a violation of Section 8(1) is not *per se* a violation of Section 8(2).

Employer action prohibited by Section 8(2) is that which has the effect of overriding the free will of the employees with regard to the formation and administration of a labor organization. Before this section of the Act is violated, evidence must exist which shows that the employer has done or said something which in fact has had the effect of depriving the employees of the ability to exercise that freedom of action and choice guaranteed to them by the Act.

This recognized distinction is important because it is justification for the position steadfastly maintained by petitioner that the Board and the lower court erred in finding it guilty of a violation of Section 8(2) of the Act.

In *N.L.R.B. v. A. S. Abell Co.*, 97 F. (2d) 951 (C.C.A. 4th, 1938) there was evidence that the superintendent of the press room made statements calculated to dissuade certain employees from joining the union. Employees were told that membership in the union was not to their best interests, that such membership was a detriment and that lower wages would result if the union was established as a bargaining agency. There was evidence of a shift in affiliation, two union men being officers of the independent Press Room Committee. Two other facts were important: All witnesses who testified to the perpetration of the unfair labor practices either were or subsequently became members of the union; and, the idea of an independent organization was conceived by an employee sometime before the actual organization. The Circuit Court of Appeals for the Fourth Circuit upheld the finding of the Board with re-

gard to the commission of unfair labor practices in violation of Section 8(1) of the Act, even though there was no evidence in the record that there was in fact any resulting effect upon the employees. The court was of the opinion, however, that there was no substantial ground for the finding that the employer sponsored the formation and interfered with administration of the Press Room Committee, the independent organization of employees similar to the Association in the instant case.

The Court said:

> ". . . while the charge was supported by conjecture and suspicion, it was refuted by positive and direct testimony. The failure of the Board to credit this testimony does not supply the lack of affirmative proof of unfair labor practice on the part of the employer."
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> *N.L.R.B. v. A. S. Abell Co.*, 97 F. (2d) 951, 957 (C.C.A. 4th, 1938).

With regard to the order for disestablishment of the independent association the court said:

> ". . . the order of the Board should be modified by the omission of the direction to the employer 'to cease and desist from recognizing the Press Room Committee as a bargaining agency for its employees . . .' The factual basis for such a direction . . . does not appear . . . ."
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> *N.L.R.B. v. A. S. Abell Co.*, 97 F. (2d) 951, 958 (C.C.A. 4th, 1938).

The Circuit Court of Appeals for the Fifth Circuit was called upon to decide a similar point of law in *Humble Oil & Refining Co. v. N.L.R.B.*, 113 F. (2d) 85 (C.C.A. 5th, 1940). The evidence showed that several superintendents made remarks derogatory of the union, told an employee he should sign up with the Federation because of his position, and ridiculed a union button. It was also shown that

a policeman hired by Humble, was seen taking notes of license numbers of cars, the owners of which were attending a union meeting. The evidence did not show any actual effect of these alleged unfair practices although the Board found them to constitute domination and coercion sufficient to label the Federation company dominated.

The court, speaking through Judge Sibley, said:

> "Unsuccessful meddling with union men has no deterrent effect upon the administration of either Federation. It would be strange indeed if a labor organization, freely organized by a large majority of the employees is to be destroyed whenever some well wishing supervisor, contrary to his duty and orders, says something in its favor * * * the employees who freely formed these organizations have the right under the law to have them function. If the employer trespassed through his representative he and they ought to be stopped, but a more serious and demoralizing trespass than here appears is necessary to show such domination or interference or support as will justify annihilation of such organization."
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> *Humble Oil & Refining Co. v. N.L.R.B.*, 113 F. (2d) 85, 92 (C.C.A. 5th, 1940).

Having set forth the language of Circuit Courts of Appeals which have decided the question in issue contrary to the lower court in the instant case, the evidence in this case upon which the findings are made will be considered. Your Honorable Court will be shown that here, as in those cases cited *supra*, the words spoken and acts done had no effect upon any employee.

Lewis Huston, found to have been a supervisory employee, after explaining to four new employees that there were two groups within the plant, one of which was an inside organization and one of which was an outside organiza-

tion, said: "You can suit yourself. I am just letting you know what is in there, what you are going to hit, what you are going to strike, so that you can form your own opinion" (A-103). There is no testimony to show that he did anything further to encourage or discourage any of the four. There were no threats as to what would happen if any of them did not join either organization. Huston did not state any preference. The record further shows (A-104) that the four with whom the conversation was had were Dougherty, Hengen, Crockett and Betty Adamson. These four subsequently joined the Brotherhood, proving conclusively that not one of them was coerced by the said suggestion to join the Association.

Russell Detwiler testified as follows (A.-126, 127):

"Q. Now, I call your attention to about the first week of October, 1940, and ask you did Mr. Russell Lukens talk to you over at the plant concerning unions?

A. Yes, when it was starting he said, 'Why not have one of our own here in the mill instead of having outsiders come and run our business for us'?

He said, 'I think we would be much better off.' "

The testimony is at most only a suggestion by Lukens to Detwiler that they have an organization of their own instead of a union from the outside and his opinion was that under such a set-up they would be much better off. The words, "I think," cannot connote that he spoke for someone other than himself. There is no testimony to show that this suggestion was made in the presence of anyone except Detwiler, who subsequently joined the Brotherhood.

The testimony of Dougherty (A-131) would seem to indicate that Huston was talking to him and asked him to join the shop union which he designated as "our shop union." This statement, if believed, must be considered in the light of the belief of Huston that he himself had a

right to belong and did belong to the Association, that the "our" union meant the one to which he belonged, not a company union as the Board must have considered in its findings and conclusions.

Huston, under examination, testified the following (A-90):

> "Q. (By Mr. Macht) Are you a member of the Association?
>
> A. Yes, sir."

Huston was informed by Mr. Barnard, Solicitor for the Association, that he was eligible to join either the Brotherhood or the Association (A-123). The belief by Huston that the Association was his organization has more force, when considered with the fact that Huston did do production work from time to time and therefore was entitled in his opinion to join the Association.

Dougherty was in no wise intimidated, coerced or interfered with because he joined and was a member of the Brotherhood.

The testimony of Mabel Symons (A-183, 188) seems clearly to be tinged with imagination rather than fact. In the first place she testified that she was working with Miss Caparella at a table when Lukens came up to Caparella and said: "Are you going to join the Brotherhood?" to which Caparella replied, "I don't know." Mabel Symons then put into the testimony two conclusions of her own and said: "and being a very timid person, she really was afraid of him," both figments of her imagination. The intimation is present that when Lukens asked Caparella if she would forget about joining unions if she would receive a raise in pay, he interfered with her joining the Brotherhood. He did not say that he would get her a raise. The testimony shows nothing except that he asked a simple question with no promises, no threats, no intimidation, certainly no co-

ercion, and that he received no answer to his question. Mabel Symons, on the other hand, stated that she explained all about the advantages of joining the Brotherhood and how it would affect Mildred Caparella if she joined it. It is clear that an individual might weigh the advantages of joining or not joining the Brotherhood and of his own volition determine which in his opinion would be the better move to make for his own benefit. Such a case would not constitute interference, restraint or coercion, but simply an estimation on the part of the individual as to the better course to take. Without further testimony any conclusion to the contrary is unreasonable.

There is some testimony (A-11) by Morris that Mr. Lysinger said to Mr. Love, " 'This organization,' he said, 'I have befriended you' and he said, 'you turn around and do a thing like this to me,' to which Morris said, 'You are accusing this man of something which he does not know nothing about.' " If Mr. Lysinger did improperly accuse Love, as Mr. Morris testified, the false accusation, if it were one, had no place in this particular case. It might, however, have been part of the testimony which collectively influenced the Board to find interference or coercion on the part of the petitioner. If that be true, it must be pointed out that the remark was made to Love alone, in the presence of Morris and Ray, and that it in no manner deterred either Love or Morris from joining the Brotherhood. Both of them were members at the time or shortly thereafter.

Petitioner first became aware of organization within its plant about September 24, 1940. A short time thereafter it consulted its solicitor and was instructed to take an absolutely impartial stand as to the two organizations, showing no favoritism and to assume a neutral attitude. These instructions necessarily were passed on to the supervisors of the plant. Add to this picture, as the testimony clearly shows, that there were two groups organizing within the plant, each of which was seeking to gain a majority of

the employees and thereby the right to bargain for all. Assume, if you will, the day the supervisors were given their instructions to maintain a neutral attitude toward everyone and in the light of the foregoing consider the following testimony.

There is nothing in the testimony of Mabel Symons (A-189, 190) to show that the alleged change of the attitude of the employer either deterred employees from joining the Brotherhood or encouraged them to join the Association. Certainly, it did not deter the witness, as she was one of the officers in the Brotherhood.

Ernest Clyde (A-225, A-226) testified that the attitude of the supervisors changed after he joined the Brotherhood. The attitude seems to have changed after the supervisors were instructed to assume a neutral attitude. The privilege of a supervisor to interrupt the conversation of any of the employees which Clyde complained of, certainly should always exist whether or not exercised. If this is indicative of a change of attitude it is certainly within the rights of a superintendent to interrupt employees who are conversing when they should be working. Mr. Clyde further complains that when he made mistakes prior to the organization activities, the supervisor would take care of mistakes but refused to do so afterwards. This change seems to be an instance of impartiality rather than discrimination. Aid to employees in preventing discovery of their mistakes could easily be warped into a showing of preference and support.

Ethel Garber Law testified (A-250, A-251) that prior to joining the Brotherhood "Everything was peaches and cream" but thereafter supervisor Lukens no longer caressed her affectionately when giving her orders. It is fairly clear that a continuation of the affectionate method of Lukens with this witness would be indicative of preference for the organization to which she belonged. To assume

a neutral attitude it was necessary for Lukens to refrain from continuing to express the friendly relationship which existed between them. Certainly, had his affections been displayed to some members of the Association, those acts, in the eyes of members of the Brotherhood, would have been acts of domination and support. The witness says Lukens was friendly with a group of girls who belonged to the Association; that he "would go up and talk to them all in a crowd." She does not say whether that was in working hours, after working hours, or at lunch time. She does not say whether he was giving them orders or what the conversation was about. What she means when she says he was very friendly with them is unexplained.

Ida Lishman testified (A-329) about the change of the supervisors after her affiliation with the Brotherhood. The extent of the change in the attitude between Russell Lukens and Ida Lishman seems to be that on one occasion when she went to him for some fill-in work he just stood there, did not look at her, and finally walked away without giving her the fill-in work. The net result of this was that instead of giving her a lot of additional work to do he permitted her to rest during this period. She aptly expresses it herself when she said: "O. K. If you want me to bum I will bum on company time" (A-329). His offense seems to be that he permitted her to rest rather than to work, while her machine was being repaired.

Ida Lishman minutely describes watching other employees in an effort to determine just where they would go, when they would go, how long they would stay at each place, who they would talk to and many other things about which she could not have had knowledge because she did not leave her machine. She testified with regard to the conduct of Frank Friend, but she does not know what Frank Friend, whom she designates as one of the members of the Association, was assigned to do, why he came upstairs or

why he went downstairs. The bald statement is made that he seemed to be running around a great deal, more than she thought was proper, and from time to time talked to his sister and other employees. She does not tell what they were saying or what the conversations were about but the intimation is that they were conversations pertaining to the Association. It seems unreasonable that from this sort of testimony anyone could draw the inference, as the Board has done, that Frank Friend was talking about Association matters. It is admitted that the conversations were not heard (A-333).

Conceding for the purpose of argument that Friend was carrying on some Association affairs during these talks, that is not evidence that the activities during working hours were condoned by management. Lishman's testimony was relied upon to show that the activities of Friend were condoned by supervisory employees.

Trial Examiner Powell (A-339):

> "Now, you testified that you saw Frank Friend on a number of occasions come up to the room where you were working?
>
> The Witness: Yes.
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> Trial Examiner Powell: I think you also testified that on at least one occasion Mr. Lukens was in that room?
>
> The Witness: Yes, that was at lunch time."

The testimony was evidence of but one fact. On one occasion during lunch hour Mr. Lukens was in the room while Frank Friend was talking with his friends. Mr. Lukens was near there, but the witness did "not know what he said * * *" (A-340). The inference drawn was that they were talking about the Association. No evidence exists, however, as to what the conversations were about. The wit-

ness admitted she did not know what they were talking about. From these unheard conversations the finding was made that meetings of the Association and other Association activities were carried on in petitioner's plant with the knowledge and condonation of management. This we believe is an improper finding.

The suggestions, expressions of opinion and unknown conversations were in no instance accompanied by threats, express or to be reasonably implied, nor were they followed by further action. There is no testimony in the entire record to so indicate. The evidence heretofore referred to covers all the material testimony pertaining to the said suggestions, expressions of opinion and unknown conversations. If they were made there is no evidence of any accompanying or subsequent threats or further action. There is no evidence that they did interfere, restrain, or coerce the employees in their right to choose the organization which they desired should represent them in matters of collective bargaining. Each individual to whom they were made, or who testified with regard thereto, either was at the time or thereafter became a member of the Brotherhood. The finding of the Board and the decision of the lower court in affirming the Board's finding is in conflict with the decisions of other circuit courts of appeals, should be reviewed by your Honorable Court and an authoritative determination made with regard to whether evidence of ineffective suggestions and statements of opinion to union men by an employer is sufficient to support a finding of a violation of Section 8(2) of the Act when the evidence clearly shows that no employee was influenced or coerced.

2. THE DECISION OF THE COURT BELOW HOLDING THAT PERMITTING THE CIRCULATION OF A PAMPHLET WHICH CORRECTLY ANSWERED CERTAIN QUESTIONS WITH REGARD TO THE ACT WAS A VIOLATION OF SECTIONS 8(1) AND 8(2) OF THE ACT IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN *N.L.R.B. v. AUBURN FOUNDRY*, 119 F. (2d) 331 (C.C.A. 7th, 1941)

The finding has been made that petitioner circulated a pamphlet entitled "Facts About the Wagner Act," which circulation constituted an unfair labor practice, violating both Section 8(1) and (2) of the Act.

The finding is based upon an inference, contrary to an express statement of petitioner, that it did not circulate the said pamphlet. Petitioner has admitted in its Answer that it permitted the circulation of the pamphlet. The Board, however, has found it reasonable to infer that the pamphlet was

> "* * * designed to and did act as an impetus to respondent's employees to form a 'company union', its language instilling the false belief that such an organization was sanctioned by the Act * * * We find further that the pamphlet achieved the effect desired" (A-468).

Careful search of the record reveals no evidence which could support the foregoing finding. The absence of testimony leaves the Answer uncontradicted in this regard. There exists, therefore, uncontradicted evidence contrary to the inference drawn.

The pamphlet was considered to be a "distorted and incomplete account of the rights of the employees" (A-471). The substance of the pamphlet was, on the contrary, a statement of rights under the Act. It correctly stated

certain rights then much in controversy. The Act permits the formation of an independent organization. The lawful existence of such organizations has been recognized by your Honorable Court in *N.L.R.B. v. Link-Belt Co.*, 311 U. S. 584, 61 Sup. Ct. 358, 360 (1941).

In *N.L.R.B. v. Auburn Foundry*, 119 F. (2d) 331 (C.C.A. 7th, 1941) the court was presented with the identical pamphlet. There, however, the company admitted that it circulated the pamphlet among its employees. Here, that is denied. There, the evidence affirmatively established the fact that the company deliberately circulated the pamphlet. Here, that fact is inferred. Here, the inference drawn is contrary to evidence produced.

The Board, in both instances, made similar findings of fact and placed the same interpretation upon the pamphlet itself. The lower court, in the present case by its *per curiam* decision, has adopted the finding of the Board.

The finding of the Board that an unfair labor practice had been committed was set aside in the *Auburn Foundry* case. Judge Major, speaking for the court, said:

> "We do not believe it is reasonably capable of such a construction. It does not purport to be a copy of the Act, but correctly answers certain questions then much in controversy. A copy of the Act would have been less illuminating, as is evidenced by the fact that the Board as well as many courts have devoted much effort to its interpretation, and in defining the rights of both the employer and employee. *There was no evidence that the pamphlet actually deceived any person, and, in our judgment, it is not susceptible of a construction that it was calculated so to do.*" (Italics supplied)
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> *N.L.R.B. v. Auburn Foundry*, 119 F. (2d) 331, 334 (C.C.A. 7th, 1941).

No evidence exists in the instant case that any person was deceived. Nor does the Board make any finding to that effect. No evidence exists to show an intention on the part of your petitioner to deceive. Consideration of all the evidence and the facts compels the conclusion that the decision of the court below is in direct conflict with the aforesaid decision of the Circuit Court of Appeals for the Seventh Circuit. This conflict of opinion presents to your Honorable Court an issue, determination of which is vital to the proper administration of the Act and necessary for a proper protection of the rights of petitioner.

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3. THE DECISION OF THE COURT BELOW HOLDING EVIDENCE THAT CERTAIN BROTHERHOOD EMPLOYEES BELIEVED THAT THEY WERE BEING WATCHED MORE CLOSELY FOR INFRACTION OF THE RULES OF THE COMPANY THAN WERE MEMBERS OF THE ASSOCIATION WAS SUFFICIENT EVIDENCE OF AN UNFAIR LABOR PRACTICE IN VIOLATION OF SECTION 8(2) OF THE ACT, IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN *BALLSTON-STILLWATER K. CO. v. N.L.R.B.*, 98 F. (2d) 758 (C.C.A. 2d, 1938)

The evidence of surveillance or close watching for infractions of the rules of the company upon which the Board has seen fit to make a finding of an unfair labor practice which aided the formation and administration of the Association is illustrated by an excerpt from the testimony.

Mabel Symons, called as a witness by the Board, testified the following (A-189):

> "A. If I went for a drink of water, he would ask me where I was going, or if I was in the ladies' room maybe a minute overtime he would say, 'what were you

doing in there? Who else was in there?' and question me, and if I left my machine I must have a very good excuse."

In *Ballston-Stillwater K. Co. v. N.L.R.B.*, 98 F. (2d) 758 (C.C.A. 2d, 1938) the Circuit Court of Appeals for the Second Circuit was confronted with a finding by the Board that evidence by certain C.I.O. members that they were watched or believed they were being watched more closely than other employees for an infraction of the rules was evidence of company domination and coercion. With regard to this finding Judge Swan remarked:

> "That certain C.I.O. members were watched or believed they were, more closely by the foreladies for infractions of the rules against leaving their machines and conversing, is too weak a reed to support an inference of discrimination amounting to domination and interference in the formation of the Association."
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> *Ballston-Stillwater K. Co. v. N.L.R.B.*, 98 F. (2d) 758, 761 (C.C.A. 2d, 1938).

The lower court, by affirming the Decision and Order of the Board, has sustained the finding that such evidence was sufficient to support the Board's finding *contra* to the rule of law in the *Ballston-Stillwater* case.

The lower court has, therefore, established a rule of law pointedly in conflict with that of the Circuit Court of Appeals for the Second Circuit. An authoritative determination with regard to the legal sufficiency of such evidence should be made by your Honorable Court.

4. THE DECISION OF THE COURT BELOW UPHOLDING THE BOARD'S FINDING OF A DISCRIMINATORY DISCHARGE BASED UPON MERE INFERENCE, THERE BEING NO EVIDENCE TO IMPEACH DIRECT TESTIMONY TO THE CONTRARY BY THE PERSON WHO ORDERED THE DISCHARGE, IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *N.L.R.B. v. TEX-O-KAN FLOUR MILLS CORP.*, 122 F. (2d) 433 (C.C.A. 5th, 1941) AND THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT IN *NEVADA CONSOLIDATED COPPER CORP. v. N.L.R.B.*, 122 F. (2d) 587 (C.C.A. 10th, 1941).

The court below affirmed a finding that Charles Morris had been discharged for union activities even though the Board could point to no evidence which could impeach the testimony of James B. Ray, Jr., his employer, that he was discharged for another reason.

Petitioner, in its Answer to the charge that Morris' discharge was discriminatory, which Answer was submitted in evidence by the Board, (Bd's. Ex. I-A-379, 380) said:

> "Respondent denies that it refused to reinstate said * * * Charles Morris because (he) * * * joined and assisted the Brotherhood * * * it further alleges that it did not refuse to reinstate Charles Morris but actually did reinstate said Charles Morris * * * but discharged said Charles Morris because he did not report after said reinstatement for two and a half weeks and for no other reason."

With regard to the discharge, Ray testified as follows (A-315):

"Q. At the time he did report, what did you do?
A. I told him that we did not need him.
Q. You sent him a discharge slip, did you?
A. That is correct.
Q. How busy was his department between December 17 and the time he reported?
A. It wasn't very busy.
Q. If he had reported on December 23rd, for how long would he have been employed?
A. Maybe a week or ten days.
Q. Would he have then been laid off?
A. Right."

Pursuant to an agreement made by letters of December 12th and 13th, 1940 (A-395, A-397) that petitioner would reinstate the striking employees, Wray and Morris presented themselves to petitioner on December 17, 1940. Petitioner submitted in evidence a copy of the notes of the interview taken by the secretary (A-456, 457). It shows that the arrangement agreed upon while Morris was present was that Morris should let Ray know one day in advance if he could not report for work on December 23rd. A later request to certain girls that they should tell Morris to let Ray know one day in advance if he could return to work (A-247) was repetition of only a part of what Ray had previously said. It was Ray's method of attempting to further impress upon Morris the fact that he wanted a day's notice if Morris could not return to work on December 23rd. The remark to the girls does not stand alone. It must be read in conjunction with what had been told Morris at the time of his reinstatement (A-456, 457).

The Board does not content itself with the reinstatement agreement nor the reinstatement but proceeds to find that,

> "the final arrangement made by Ray was for Morris to give him a day's notice *whenever* he was able to return to work" (A-489). (Italics supplied)

The unreasonable nature of this finding is plain. The employee would be permitted to return to work a year or anytime later by merely giving to the employer one day's notice before so doing. The discharge, rather than being based upon a discrimination, was based upon breach of contract.

In *N.L.R.B. v. Tex-O-Kan Flour Mills Co.*, 122 F. (2d) 433, 438 (C.C.A. 5th, 1941) Judge Sibley speaking for the court said:

> "If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true that the discharger knows the real cause of discharge, it is a fact to which he may swear. If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts they must be inconsistent with the positive sworn evidence on the exact point."

In *Nevada Consolidated Copper Corp. v. N.L.R.B.*, 122 F. (2d) 587, 595 (C.C.A. 10th, 1941) Phillips, J., speaking for the court, said, with regard to the refusal to rehire:

> "If the reason given by Boyd in his testimony under oath was a reasonable one, the onus was upon the Board to establish the falsity of his explanation and that the motivating reason was union affiliation.
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> It was not sufficient for the Board to show that employment may have been refused on account of membership in Local 63 * * * and of union activities. If the refusal to reemploy may have been one of two things, one illegal and the other legal, the fact-finding tribunal

may not guess or speculate as between the two causes. There must be satisfactory foundation in the evidence to support its conclusion. When the evidence is consistent with either of two hypotheses, it establishes neither.

Furthermore, it was not essential that petitioner establish that the grounds upon which it refused reemployment actually existed. It is sufficient if petitioner in good faith reasonably believed they existed."

Had no reasonable ground for the discharge been given, if the evidence did not show that Morris would have been reemployed if he had returned as he agreed to do, or given notice of his inability to so return, then petitioner admits the finding of discriminatory discharge could not now be attacked. The Board would then have been the trier of fact and its finding could not have been validly assailed.

Evidence did exist, however, which denied the charge of discriminatory discharge. Evidence did exist showing that had Morris either returned as he agreed or given the required notice, he would not have been discharged.

It is apparent that the lower court in the instant case has made a determination contrary to and in conflict with decisions of the Circuit Courts of Appeals for the Fifth and the Tenth Circuits. The conflicting cases cannot be reconciled. A conflict in the determination of a point of law results, which your Honorable Court is requested by petitioner to authoritatively determine.

5. THE DECISION OF THE COURT BELOW THAT UNFAIR LABOR PRACTICES HAD BEEN COMMITTED BY (1) AN EMPLOYER'S REFUSAL TO RECOGNIZE IMMEDIATELY THE ORGANIZATION LATER FOUND BY THE BOARD TO BE THE PROPER BARGAINING AGENCY, WHERE TWO ORGANIZATIONS EACH PRESENTED A CLAIM OF MAJORITY MEMBERSHIP AND DEMAND FOR IMMEDIATE RECOGNITION, BUT NEITHER OFFERED TO PROVE THEIR REPRESENTATIVE STATUS; AND (2) BY THE EMPLOYER'S REQUEST TO THE BOARD TO CERTIFY THE PROPER REPRESENTATIVE, IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN *TEXARKANA BUS CO. v. N.L.R.B.*, 119 F. (2d) 480 (C.C.A. 8th, 1941).

The lower court, by affirming the Decision and Order of the Board has determined that petitioner has been guilty of an unfair labor practice in violation of Section 8(5) of the Act by failing to recognize immediately the Brotherhood as sole bargaining representative for all of its employees regardless of the fact that the Association had made a similar claim and that neither submitted proof of their right to so act.

The pertinent facts relative to the conclusion of the Board and the court below are the following:

On October 17, 1940, the Association addressed a letter to the petitioner claiming that it represented a majority of the employees, and demanded the right to act as the sole and exclusive bargaining agency on behalf of all of the employees (Resp. Ex. No. 3; A 455).

On October 21st the Brotherhood, upon suggestion and request by petitioner's counsel, addressed a letter to petitioner in which letter it claimed to represent a majority

of the employees and demanded the right to act as the sole and exclusive bargaining agency for all the employees (Board's Ex. 12; A 444).

On October 22nd petitioner addressed a letter to the Association, acknowledging its letter of October 17th, setting forth the similar claim of the Brotherhood and stating the impossibility of recognizing either group until one of them was properly certified by the Board (Board's Ex. No. 13-B; A 447).

On October 22, 1940, petitioner addressed a letter to the Brotherhood, acknowledging receipt of its letter of October 21, 1940, stating the demand of the Association to be the sole and exclusive bargaining agency for all the employees of petitioner and stating the impossibility of recognizing either group under the circumstances until one was properly certified by the Board (Board's Ex. No. 13-A; A 445).

No proof to support the claim of either the Brotherhood or the Association of their majority of employees was submitted to petitioner.

On October 23, 1940, petitioner addressed a letter to the Board setting forth the facts that both the Brotherhood and Association each claimed as members a majority of petitioner's employees and each demanded the right to be the sole and exclusive bargaining agency on behalf of all the employees. Petitioner requested the Board to hold an election and to determine which of these groups actually represented the greater number of employees and was therefore entitled to represent all the employees.

The setting forth of this correspondence should be sufficient to show that petitioner did not engage in an unfair labor practice within the meaning of Section 8(5) of the Act by refusing to recognize either the Brotherhood or the Association as the collective bargaining agency for all of

the employees. Had petitioner wished to favor the Association, which is the contention of the Brotherhood and the finding of the Board, when it received the foregoing letter of October 17th from the Association, immediate recognition that the Association represented the greater number of employees and immediate acceptance of it as the bargaining agency for all would have resulted. Petitioner, however, did not recognize the Association. Having heard of the fact that two groups had been organized within the plant it did not make any immediate determination. Four days later (October 21, 1940) a similar claim and demand was made by the Brotherhood. The foregoing facts alone should be sufficient to convince a reasonable individual that it was not the intention of petitioner to favor either side. To find to the contrary as a matter of law under the foregoing circumstances that the said conduct was an unfair labor practice, seems to be an unreasonable and unwarranted finding.

The nature of the evidence later submitted is important because upon that evidence the finding of a refusal to bargain with the Brotherhood on October 22, 1940 was based.

Neither organization submitted proof of its alleged majority until the hearing was held by the Trial Examiner. At this time there were submitted in evidence a number of applications for membership in the Brotherhood (Bd's. Ex. 11-1 to 11-39; A-404-443). Careful study of these applications brings to the fore the following facts: Some had printed signatures; some were signed by persons other than the named member (Bd's. Ex. 11-38, A-441); some were undated (Bd's. Ex. 11-4, A-407; 11-35, A-478); one member did not join until after the strike (Bd's. Ex. 11-35, A-478, see A-275); some cards had stubs attached, which stubs should have been filled in and given to a member to show acceptance into Brotherhood (Bd's. Ex. 11-2, 3, 35, 37, 38, 39, A-405, 406, 440, 441, 442); and,

several whose cards were admitted in evidence had ceased being employees (Bd's. Ex. 11-2, 3; A-405, 406).

Had petitioner been presented with such evidence, as a reasonable person it could not have determined that the Brotherhood validly represented a majority of its employees. It could not have honestly determined that the several application cards with unsigned stubs attached showed that these persons had been accepted by the Brotherhood. It would have found several printed signatures, the authenticity of which it could not have determined without further evidence. It would have found several signatures which were not in the handwriting of those named therein. Nor were the alleged signators produced at the hearing to prove the authenticity of their signatures and their present status as employees despite the request by counsel for petitioner. Had petitioner noted the names of those claimed by each organization it would have found that several employees had apparently joined both organizations.

In the light of the decision below, the dilemma which the management faced is apparent. To accept one claimant as the sole bargaining agency would have subjected it to a charge of unfair labor practice by the other. To request the Board to hold a secret election to determine the appropriate agency under Section 9 of the Act seemed proper and equitable. This the company did.

Further developments prior to the hearing before the Trial Examiner show the uncertainty of the Brotherhood's right to bargain for all of the employees. Concerning a meeting of representatives of the Brotherhood, the Federal Mediation Board, the State Conciliation Board and petitioner on October 27th and 28th, Mr. Mangan, General Representative of the Brotherhood testified as follows:

> "A. Well, at the meeting I suggested to Mr. Hillegass that we negotiate an agreement just covering

our membership, not to cover all the employees, just an agreement to cover our members.

Q. (By Mr. Macht) Do I understand from that that you proposed to bargain just for your membership only?

A. Yes, sir.

Q. And Mr. Hillegass, attorney for the company, would not grant that demand?

A. No."

The Board, with regard to the above, says the following:

". . . but again the Respondent *thwarted* the union by maintaining that it could not grant even this limited recognition to the union." (Italics supplied) (A 484).

It does not seem necessary to point out that counsel for petitioner was correct in his stand in this matter and that the criticism of the Board is grossly improper. Had the Brotherhood been certain of its majority it would not have made the foregoing suggestion.

In *Texarkana Bus Co. v. N. L. R. B.*, 119 F. (2d) 480, 484, (C.C.A. 8th, 1941) the Board found the company guilty of a refusal to bargain collectively with the Amalgamated Union. It based its findings upon the following evidence: The organizer and a committee presented themselves and demanded recognition. The company requested proof that they represented a majority of its employees. It was told that proof was unnecessary and that it would have to take the word of the organizer. Offer was made to permit a check on the payroll records. This was refused. The organizer contended that it was the policy of his union for many years "to tell nothing."

Setting aside the Board's finding of a refusal to bargain, the Circuit Court of Appeals for the Eighth Circuit remarked:

"The law imposes the affirmative duty to treat only the true representative, and hence the negative duty to treat with no other. As the employer must act at his peril, common prudence dictates that he refrain from acting until satisfactory proof is produced that the representative in fact speaks for a majority of the employees.

* * * * * * *

"No unfavorable inference should be drawn from the fact that management refused to bargain, in the absence of substantial proof that the Brotherhood was in fact the representative of a majority of employees.

* * * * * * *

"The employer cannot be required to devote his time to negotiating with every individual claiming to represent a bargaining unit, and cannot be charged with unfair practice in this regard unless there is presented to him evidence of a substantial character showing that the representative is in fact an authorized bargaining agency."

In the instant case no proof of any kind was presented to petitioner by either organization that it represented a majority of its employees. Petitioner was in a position where to act would have been to do so at its peril. The Board, nevertheless, drew an unfavorable inference and found an unfair labor practice violating Section 8(5) had been committed by refusing to bargain immediately with the Brotherhood without proof of its representative status. This finding, affirmed by the lower court, is in conflict with the above cited case and presents an issue of law to be determined by your Honorable Court.

C. THE DECISION OF THE COURT BELOW IN HOLDING THE ORDER DID NOT VIOLATE THE SUBSTANTIVE DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION FOR THE UNITED STATES IS IN CONFLICT WITH THE RULE OF LAW IN N. L. R. B. v. JONES & LAUGHLIN STEEL CORP., **301 U. S. 1, 57 SUP. CT. 615 (1937):**

The decision of the court below, if enforced, would be violative of the substantive due process guaranteed by the Fifth Amendment. The Fifth Amendment guarantees that no person shall be deprived of liberty without due process of law. The constitutional meaning of "liberty" embraces not only the right to be free from physical restraint of the person, but embraces the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to earn his livelihood by any lawful calling and to pursue any livelihood or avocation. The right to be free to obey all the constitutional laws of the government is inherent.

While recognizing the truth of the foregoing statement, well-meaning persons may, perhaps unwittingly and without a realization that they are so doing, bring about an impairment of that right.

Consider the circumstances in this case. The employer, fully cognizant of the duty placed upon him to bargain exclusively with the representatives of a majority of the employees within the appropriate unit, is requested by each of two organizations to recognize it as such representative. Both organizations claim to represent a majority of the employees. Both claim but do not show that they represent a majority. Later evidence before Examiner at the hearings is not clear and unequivocal. It is confused and contradictory. Fear exists that recognition of one as the

sole bargaining agency will subject the employer to a charge of an unfair labor practice. Petitioner acknowledges the respective claims and agrees to bargain with the one presenting proper certification from the Board. It requests the Board to hold an election to determine the proper bargaining agency. All that petitioner has done has been in accordance with the statutory enactment.

Instead of an election being held, an arbitrary finding has been made by the Board that petitioner has been guilty of an unfair labor practice because it refused to accept the Brotherhood as the sole and exclusive bargaining agency. The Association has been arbitrarily declared to be company dominated. One of the reasons in support of that finding is that petitioner refused to bargain with the Brotherhood, thereby giving support to and interfering with the formation of the Association.

The right to live and carry on a business or avocation pursuant to the law of the land must still exist. Nowhere in the Act is there sanction for an invasion of the liberties guaranteed by the Fifth Amendment. Should such sanction exist, the unconstitutionality of the Act would be beyond question.

Chief Justice Hughes, when considering the constitutionality of the Act in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 43, 57 Sup. Ct. 615, 627 (1937) remarked:

> "Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work . . . *Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious.*" (Italics supplied).

Embodied in those sentences is the principle of law which your petitioner prays your Honorable Court to con-

sider as being determinative. The correlative rights are recognized and urged. The right of the employer is that he shall be permitted to conduct his business in an orderly and *lawful* manner without being subjected to arbitrary restraints.

Your Honorable Court has shown that the restraint which cannot be considered arbitrary or capricious is that which prevents the *unjust* interference with the rights of the employees. *Unlawful interference* is the criterion determining whether the restraint imposed is arbitrary, capricious and violative of due process. This has been a long recognized criterion.

In *United States v. Joint Traffic Ass'n.*, 171 U. S. 505, 572, 19 Sup. Ct. 25, 33 (1898) the Court, in referring to the definition of "liberty" in *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431 (1896) said:

> "We presume it will not be contended that the Court meant, in stating the right of the citizens 'to pursue any livelihood or avocation,' to include *every means* of obtaining a livelihood, *whether it was lawful or otherwise.*"

Petitioner has not interfered with or dominated the formation of the Association or any other organization of employees. It has not refused to bargain collectively with the *proper* representatives of its employees. All that petitioner requests is that an election be held to determine such *proper* representative so that it may bargain collectively with it. To find that petitioner has committed an illegal act when there is no substantial evidence in support of the charge, and when the evidence fails, as a matter of law, to support it, and then to penalize it for attempting to obey, and in fact obeying, the intent and spirit of the Act, could be nothing less than an arbitrary and capricious administration of the Act.

The decision of the court below, therefore, is in conflict with the rule of law in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 Sup. Ct. 615 (1937) and it is vital to a correct and just administration of the Act and for the protection of petitioner's constitutional rights that the finding be reviewed and set aside by your Honorable Court.

D. THE DECISION OF THE COURT BELOW VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION FOR THE UNITED STATES IN THAT IT IMPOSES AN ARBITRARY RESTRAINT UPON THE RIGHT OF FREE SPEECH AND PENALIZES PETITIONER FOR UTTERING A LAWFUL EXPRESSION OF OPINION

The First Amendment is a guarantee to every individual that the Congress will make no law "abridging the freedom of speech." That this freedom remains inviolate in labor disputes is recognized. Your Honorable Court has recently said:

> ". . . the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."
>
> *Thornhill v. Alabama*, 310 U. S. 88, 102, 60 Sup. Ct. 736, 744 (1940).

If the dissemination of information concerning the facts of a labor dispute are a vital part of free speech, then the dissemination of information concerning rights under the Act must likewise be regarded as being protected by the same constitutional guaranty. The Board has found, and the lower court adopted the finding, that petitioner circulated a pamphlet entitled "Facts About the Wagner

Act." Assuming the said finding to be a fact, when petitioner permitted the circulation of the pamphlet it did no more than it would have done had it read or spoken the contents thereof to its employees. The effect of the permissive circulation may be said to be an expression of the opinions of petitioner.

Congress did not intend to arbitrarily restrict the freedom of speech and discussion of the merits of any organization by an employer, or his supervisory employees. Senator Walsh, when arguing for the passage of the measure, remarked:

> "An employee, *like an employer*, has the right to discuss the merits of any organization. Indeed, Congress could not constitutionally pass a law abridging the freedom of speech." (Italics supplied).
>
> 79 *Cong. Rec.* 7661 (1935).

Fear by some Congressmen that a zealous Board might construe expressions of opinion by an employer in such a manner as to abridge the employer's rights of free speech, prompted the introduction of an amendment to the bill which provided:

> Nothing in this Act shall abridge the freedom of speech, or of the press, as guaranteed by the first amendment to the Constitution.

Senator Walsh, when reporting the action of the Conference Committee which considered the amendment, remarked:

> "The conference agreement rejected this amendment as having no proper place in the bill. There is no reason why the Congress should single out this provision of the Constitution for special affirmation. The amendment could not possibly have any legal effect, because it was merely a restatement of the first amend-

ment to the Constitution, which remains the law of the land irrespective of Congressional declaration."

79 *Cong. Rec.* 10, 259 (1935).

Freedom of speech and of opinion is, as said by the late Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 319, 327, 58 Sup. Ct. 149, 152 (1937) "the matrix, the indispensable condition, of nearly every other form of freedom."

If this constitutional guaranty of freedom of speech were to be abridged, the very rights which the Board seeks to protect would be of little value. The rights to seek converts to unionism and collective bargaining would be hollow and meaningless.

It is conceded that this right of free speech is not without exception. It is conceded that this right is not abridged within the constitutional meaning of the term where it is used as a cloak to hide a vicious design or plan to destroy the efficacy of the Act. It is recognized that

> "Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority."
>
> *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, 57 Sup. Ct. 615, 622 (1937).

Your Honorable Court has been shown that the expressions of petitioner and of its supervisory employees do not constitute a violation of the Act, when measured by the decisions of other courts.

Petitioner has shown that all remarks made by it or its supervisory employees were mere suggestions and opinions, not threats or demands. These suggestions and opinions were made to employees all of whom subsequently

joined the Brotherhood, thus proving conclusively that coercion or domination of any employee was not effected. Under such circumstances the Decision and Order of the Board affirmed by the lower court can do nothing less than impose an arbitrary restraint upon the right of free speech guaranteed to petitioner and its supervisory employees. To find petitioner guilty of unfair labor practices because the right of free speech was exercised in a manner not resulting in discrimination and coercion, is to penalize the petitioner whose officers have exercised that right.

The court in *N. L. R. B. v. Ford Motor Co.*, 114 F. (2d) 905, 915 (C.C.A. 6th, 1940) aptly said:

> "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussions of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."

As stated in *Midland Steel Products Co. v. N. L. R. B.*, 113 F. (2d) 800, 804 (C.C.A. 6th, 1940) (quoted by the court in the *Ford* case *supra*, at 915):

> "Unless the right of free speech is enjoyed by employers as well as employees, the guaranty of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person."

The guaranty, thus considered, embraces the remarks made by James B. Ray, Jr., that "there isn't going to be no union here" and "I wasn't in favor of organization of any trade." It applies with equal effect to the opinions made by the supervisory employees to the Brother-

hood employees. The circulation of the pamphlet "Facts About the Wagner Act" must also come within its protective embrace.

Your Honorable Court should review the instant case because basic constitutional rights are involved, and because of the arbitrary nature of the Board's findings and the lower court's decision when compared with decisions of other circuit courts of appeals, to determine petitioner's fundamental rights in accordance with the constitutional protection guaranteed by the First Amendment to the Constitution.

E. THE DECISION BELOW IS CONTRARY TO THE EXPRESSED PURPOSE AND INTENT OF THE ACT, AND IS A RESULT NOT CONTEMPLATED BY THE CONGRESS WHICH ENACTED IT

> ". . . the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act . . . the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights . . ."
>
> *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 253, 59 Sup. Ct. 490, 495 (1939).

The purpose of the Act as above enunciated by Chief Justice Hughes is expressive of the ideals for which it was enacted. With such purposes none can disagree. Consummation of the ideals is devoutedly to be sought. The critical period through which our nation is passing makes more apparent the necessity for its consummation. Peti-

tioner fully endorses the policy and purpose of the Act. Petitioner believes, however, that enforcement of the Board's order will neither aid the policy nor further the said purpose, but, on the contrary, its enforcement will militate against the fundamental purpose of the Act.

Enforcement of the Board's order and acceptance of its decision will deny to the citizens of the United States of this judicial district rights permitted citizens of other judicial districts and will enable the Board in every instance to condemn any independent and unaffiliated organization. It will impose upon an employer a duty to determine immediately, at his peril and without proof, the representative status of two employee organizations, each of which claims to represent a majority of employees. It will permit the Board to place the stigma of a discriminating and ruthless employer upon one honestly seeking to obey the law, even though no evidence of unfairness, coercion or domination exists. The employer's freedom of speech will be abridged and he will be deprived of the substantive due process of law guaranteed by the Fifth Amendment.

The aforesaid results were not contemplated by the sponsors of the Act nor by the Congress which enacted this legislation. Consideration of arguments made by the sponsors of the Act in Congress can lead to no other conclusion.

Senator Wagner, when he introduced the Bill in the Senate, made the following remarks:

> ". . . nothing in the measure discourages employees from uniting on an independent or company-union basis, if by these terms we mean simply an organization confined to the limits of one plant or one employer."
>
> 79 *Cong. Rec.* 2371 (1935).

Continuing, the Senator expressed his conception of the elements of a company dominated union when he said:

> "The only prohibition is against the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules or regulations without his consent, and which cannot live except by the grace of the employer's whim."

79 *Cong. Rec.* 2372 (1935).

Senator Walsh expressed the majority view when he remarked:

> "Nothing in this bill requires an employer to compel his employees to organize. All employees are free to choose to organize or not to organize, to join any or whatever labor organization or union they choose. If employees choose to organize a shop committee or a union for a particular plant or company, they may do so."

79 *Cong. Rec.* 7659 (1935).

What constitutes a company dominated union is further expressed by Senators Walsh and Wagner as they spoke to the Senate:

> "(Mr. Walsh) In some company unions the employer hires the hall where the union meets, pays for the ballots, employs clerical help for the union, pays salaries to the representatives of the workers. This is called among the employees, a 'company dominated' union."
>
> * * * * * * *
>
> "Mr. Wagner: Mr. President, I am sure the Senator meant to name one other common practice of these company dominated unions. In nearly all cases, their constitutions are drafted by the employer, and contain

provisions preventing modification without the consent of the employer."

* * * * * * *

"Mr. Walsh: What the Senator frankly has said is very important. We found at our hearings that many of the company unions had had their constitutions and by-laws prepared by the employer and handed over to them, and there are provisions in the constitutions and by-laws that no changes can be made without the consent of the employers. Of course, such an organization is not a free labor organization, and cannot be held to be such."

79 *Cong. Rec.* 7660 (1935).

The understanding of members of the House of Representatives supporting the bill did not differ in this regard from that of the Senators. Mr. Truax, a representative sponsoring the bill, discussing the rights of employees, said:

"There is nothing in the bill that prevents the formation of a company union. This bill merely gives them an opportunity to choose for themselves. If the company union is the free choice of the majority of the workers all well and good."

79 *Cong. Rec.* 9716 (1935).

Your Honorable Court has likewise recognized the validity of the company union. In *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 587, 61 Sup. Ct. 358, 360 (1941) Mr. Justice Douglas said:

"An 'inside' union as well as an 'outside' union, may be the product of the right of the employees to self-organization and to collective bargaining 'through representatives of their own choosing' guaranteed by Sec. 7 of the Act."

The importance of these remarks cannot be ignored. Several well defined thoughts are apparent. First, there may be a valid company union. Second, there are certain necessary elements of a company dominated union. Third, and most important, is the emphasis placed upon the right of an employee to choose for himself the organization which shall represent him in collective bargaining.

The principle that an "inside" union may lawfully exist is settled by judicial affirmation. It is, therefore, unnecessary to dwell upon the point. Consideration, however, of the accepted elements of a company dominated union is important. It is to be noted that Senator Wagner, the sponsor of the measure, which is often referred to as the "Wagner Act," understood such an organization to be one organized at the instigation of the employer, organized on his behalf, and incapable of existing and operating but for the will or whim of the employer.

In the instant case there is no evidence that petitioner instigated the formation of the Association. Evidence to the contrary was given by Mr. Tressler and Mr. Friend. They testified that they planned such an organization during the summer of 1940. No evidence exists that the organization was organized on petitioner's behalf. The testimony shows the Association was organized contrary to petitioner's wishes, for, as stated by Mr. Ray, "I was not in favor of organization of any trade." (A-295).

The primary criterion is whether the organization is capable of functioning in an independent manner. This fundamental element was stressed by the sponsors of the Act. The Board and the lower court apparently ignored it. The constitution and by-laws of the association were submitted in evidence. They showed clearly that there were no rights which petitioner could exert to affect freedom of action by the members of the Association. There were no powers given to petitioner, the exercise of which could

have nullified any act of the Association. No restraint upon freedom of action existed as in *N. L. R. B. v. Newport News Shipbuilding Co.*, 308 U. S. 241, 60 Sup. Ct. 203 (1939). In that case Mr. Justice Roberts pointed out that the union condemned could not have acted independently. No freedom from employer restraint and domination existed. Those circumstances are not present in this case.

While the Board noted that the constitution and by-laws were submitted in evidence, no consideration was given to the independent nature of the Association's existence. It is evident from statements and cases above set forth that before a union could be said to be company dominated it must be impossible for it to function independently. That it does not express itself in arrogant outbursts and strikes and assume a militant attitude toward the employer is no evidence of subserviency. That it functions in a manner conducive to industrial peace effectuates the very purpose of the Act. The declared policy in Section 1 of the Act makes it adequately clear that Congress was and is still seeking a "friendly adjustment of industrial disputes."

Well expressed is the Congressional intent that each employee shall have the right to choose for himself the organization which, or persons who, shall represent him in matters of collective bargaining. This intent finds expression on almost every page of the Congressional Record pertaining to the Act. It finds expression in the Act itself and in decisions which have interpreted it. Is it now to be said that when a group of employees have formed their own organization, and, with advice of counsel, wholly disinterested in the business of the employer, have drawn up their constitution and by-laws, they are to be denied the right to have it function as their representative? When the constitution and by-laws show clearly the impossibility of employer control, may the Board now ignore that fact? May the unfair labor practice of an employer in unsue-

cessfully attempting to induce a member of an opposing organization to cease union activities be said to warrant condemnation of this independent union? May the utterances of supervisory employees not shown by the evidence to have affected any employee, now be sufficient evidence to justify annihilation of an organization created by the employees?

Such results were never intended by the Act. Such consequences are not in accord with the great social purposes intended by the framers of the law. Certainly, they are not effective to preserve to the individual employee the right to choose for himself the organization which shall represent him in collective bargaining.

How, then, can the Decision and Order of the Board, affirmed *per curiam* by the court below, be justified? It is entirely *contra* to the very purpose of the Act itself. Arbitrary and capricious findings of fact, based on no substantive evidence or based upon inferences drawn from evidence which is nothing more than the surmise, conjecture and suspicion of witnesses, in most instances, are made the basis for the Order.

It has been determined by the Federal courts that the Board is not made either guardian or ruler over the employee. It is empowered to deliver them from restraint at the hands of the employer when it exists. The duty of the Board is not to create this restraint. The duty is to order its cessation if and when the restraint exists. The Board may not create doubt in order to resolve it in favor of one side as against another. Nor should the Board be permitted to take facts, warp their known and intended meaning into some unreasonable and unintended meaning and, from this constructed interpretation infer the existence of facts theretofore impossible of determination.

The Board, in its unique capacity as accuser, prosecutor, trier of fact, and applier of the law, should be held

to the greatest of good faith. It represents a public cause of vast magnitude. Successful administration depends upon public confidence.

The existence of facts which show that the employer has spoken improperly or done acts which were improper should warrant a cease and desist order. When, however, evidence shows conclusively that no employee was in fact coerced or dominated, the impropriety of the employer's conduct should not be made the basis for a finding of company domination and the consequent disestablishment order. If the employer, by his own deeds or words, or through his representative, has trespassed upon the rights of his employees, he and they should be ordered to cease such activities. An organization, however, created by the employees themselves, and by them designated as their bargaining agent, should not be destroyed for that reason.

Chief Justice Stone foresaw the possibility that the free choice of employees might be thwarted by the Board because of the commission of unfair labor practices by the employer. In *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 270, 58 Sup. Ct. 571, 576 (1938) he remarked:

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer's recognition of an existing union before an election by employees under Section 9(c) . . . even though it had ordered the employer to cease unfair labor practices."

The instant case is illustrative of the assumed situation. In the present case those to whom the employer's remarks were made either were or subsequently became members of the Brotherhood. This is conclusive of the fact that no coercion or domination resulted from the alleged unfair labor practices of the employer. It is also conclusive that the Association was not in fact dominated by petitioner.

If an organization is formed and administered exclusively by the employees, and is their chosen representative, there is no excuse for destroying its usefulness for the purpose for which it was created. Its destruction would defeat the very purpose for which the legislation was enacted, namely, to protect and safeguard the right of employees to organize and to bargain collectively through representatives of their own choosing.

The conclusion seems inescapable that the Decision and Order of the Board, affirmed *per curiam* by the court below, effectively deprives the employees of their rights to organize as they choose and to select their own bargaining agency for the purpose of collective bargaining. This paradox results—the very rights which the Act was intended to protect and preserve are set at naught by the agency Congress has created to protect and preserve them.

> "There is practically no change whatever in the present conditions affecting employers and employees except to provide for the creation of the machinery without interference by employers to permit employees to choose representatives to go to their employers for the purpose of collective bargaining. This is done because we have found that the reason why there are labor difficulties, labor disputes from time to time, is that employers will not confer with their men, will not meet them, *do not know who are their representatives* . . . ." (Italics supplied).
>
> Mr. Walsh: 79 *Cong. Rec.* 7660 (1935).

Fundamentally, one of the ends sought to be achieved by Congress was the determination by the employees of a bargaining agency which would represent all employees in collective bargaining. The machinery is provided in Section 9 of the Act. By the Rules and Regulations promulgated by the Board the employer as well as the employee

was given the right to petition for certification of a representative.

Provision for this machinery was inserted so that the bargaining agent could be selected by the employees themselves. The selection was not to be made by the employer. Nor was it to be made by the Board. Selection of a bargaining agent by the Board is quite as violative of the spirit of the Act as the employer's domination of the employees when they are making the choice. Nothing should prevent the employees of the organization freely selected and representing the greater number from exercising their rights. Should the employer be presented with clear evidence of a majority designation, no election need be had. It would follow naturally that a refusal to bargain with that selected agency under such circumstances would be an unfair labor practice violating Section 8(5) of the Act.

A different situation is presented when two groups, each capable of independent action, claim to represent a majority of employees and when neither submits evidence of its claimed majority status to the employer. Under such circumstances common prudence dictates that the employer refrain from acting until satisfactory proof is produced that one organization in fact speaks for a majority. If there is no evidence produced then a certification under Section 9 should be made. To say that the employer must choose the representative or be held to have committed an unfair labor practice is contrary to the intent of the Act. To force him to choose will place him in the unenviable position of doing so at his peril.

Escape from the dilemma exists only by appealing to the Board to order a secret election, determine the majority and certify a representative. The result would be equitable and binding upon all. Petitioner sought to avail itself of this right. It notified each organization of its willingness to bargain with the group presenting proper certifica-

tion from the Board. It requested the Board to hold an election. Notwithstanding this attempt to comply with the Act, petitioner was later determined to have committed an unfair labor practice because it did not recognize the Brotherhood immediately as the sole and exclusive bargaining agency. The request for certification of a representative was also found to be unfair practice, being considered a diabolical attempt to influence the employees to join the Association.

The effect produced is certainly not in accord with the statement of Senator Walsh and the expressed intent of the Act. One of the causes of labor disputes was that the employers "do not know who are their (employees) representatives . . ." 79 *Cong. Rec.* 7660 (1935). The measure was enacted to provide machinery for determining those representatives. If the ruling of the lower court is permitted to remain, then the attempt to secure the certification of a bargaining agency is an unfair labor practice.

Petitioner requests, therefore, that your Honorable Court direct a writ of certiorari to issue to the lower court in order that this Honorable Court may then clearly enunciate the purpose and intent of the Act and of the Congress which enacted it, to the end that thereafter the Board and the lower courts may administer and enforce it in a manner consistent with the fundamental policies intended to be embraced therein.

F. DETERMINATION OF QUESTIONS OF LAW PRESENTED TO YOUR HONORABLE COURT IS OF GREAT NATIONAL IMPORTANCE AND NECESSARY TO A PROPER AND JUST ADMINISTRATION OF THE ACT

Your petitioner is a comparatively small industry employing a maximum number of 85 employees. The annual

value of its product may be placed between $100,000.00 and $249,000.00. The issues of law presented to your Honorable Court are, however, not peculiar to the smaller industries of the nation. They are fundamental to the administration of the Act as it applies equally to all industries encompassed by its terms. Determination of them is, nevertheless, of particular importance to smaller industries which form a large portion of national industry.

Petitioner, the Norristown Box Company, is only one of a great number of industries. It is peculiarly representative of innumerable smaller establishments employing from 50 to 100 persons. In the field of paper products alone there are 621 individual concerns the total value of whose products is from $62,100,000 to $155,250,000. Other industries which fall within the class raise the number to 24,718. Consideration of petitioner's representative nature would embrace all industries the value of whose products varies from $5,000 to $249,000, the total number of which amounts to 152,884. There are 117,035 wage earners in the paper industry whose total payroll in 1939 were estimated to be $30,126,877. In the 152,884 industries there are 1,674,910 wage earners whose payrolls in 1939 totalled $1,568,628,114.

The representative nature of petitioner's industry makes evident that consideration by your Honorable Court is sought not merely by a small industrial establishment to have rights adjudicated for its own benefit, but an industry which is similar to thousands of like concerns. Petitioner's present legal involvement with the National Labor Relations Board is not unusual. Similar controversies exist in thousands of other establishments. Their businesses are grouped in lower brackets when amount and value of goods produced and employees maintained are considered. Being individually small, slight thought is given to their problems or contentions. Their businesses, nevertheless, form the backbone of American industry. Collectively

they constitute a source of supply for large industry without which the large industry would be seriously hampered. Without them our economic system could not long exist. They exemplify the backbone of American enterprise.

In this group of industry the National Labor Relations Board has found a group of employers who, although they believe their employees would prefer not to join a national organization, but a local group which has peculiar knowledge of their particular needs, do nothing as do their employees who often do not know that they are permitted under the Act to have an independent union of their own. If the employer informs them of that fact, he will invariably be found guilty of coercion and the organization formed by the employees will be found to be company dominated. Few of these employers can appeal from the decisions of the Board because of the expense inherent in an appeal to the federal courts. Submission to the order of the Board is the rule, and this is true although the most sincere conviction of innocence may be present and although the employees themselves desire a local and independent organization. The present appeal is indeed burdensome to petitioner. Of these facts the Board is aware. Any findings, therefore, made by the Board by drawing unwarranted inferences from evidence of little or no substance, have a serious and far reaching effect. Words uttered and acts done in honest attempted compliance with the Act may be warped into findings of fact devoid of any basis or reason. Ample illustration for these statements is the instant case. With no evidence of a single employee being actually coerced and with all the evidence actually showing that any statement made or act done by petitioner had no effect upon any employee, the Board has found that petitioner coerced its employees into joining the Association. The finding that the Association was company dominated in formation and administration is devoid of evidentiary support. No finding is made that the Association

could not function as an independent bargaining agent. No quarrel is had with its constitution and by-laws. Reliance is placed upon words spoken to members of the Brotherhood whose membership was never affected.

Further illustration is provided by the Board's finding of a refusal to bargain. Fully cognizant of the duties placed upon it by the Act to bargain with the representative selected by a majority of its employees, petitioner, upon receiving requests for bargaining rights from two organizations immediately requested the Board to hold an election under Section 9 of the Act. It refused to recognize either contending organization immediately. Instead it informed each organization and the Board that it would be willing and ready to bargain with the organization which presented proper certification from the Board. It was not presented with any evidence of membership prior to the hearing before the Trial Examiner. The Brotherhood representative at a meeting of representatives of the Brotherhood, the Federal and State Conciliators and petitioner, requested recognition for the Brotherhood only, indicating uncertainty of the validity of its claim. Evidence presented at the hearing was so confused and equivocal that no reasonable person could say which represented a majority. The Board, nevertheless, determined that petitioner was guilty of a refusal to bargain, because it refused to recognize either of two organizations without proper certification from the Board which has been created to make that determination.

Unless restrained by your Honorable Court dissension and labor unrest will prevail, not only between employer and employee, but between employee and employee, and this group of American industry will be harmed rather than aided. The questions of law presented are of such vital importance to a just and proper administration of the Act that authoritative determination of them is of greatest national importance. Determination by your Hon-

orable Court of the issues involved will enable all industries of the nation to have the foregoing questions answered and clarified and a clearer understanding and appreciation of the rights preserved to and duties placed upon them by the Act. The right of the employer to express his own views, if he does nothing to intimidate the employees by threats and actual coercion, will be finally determined. The right of the Board to declare organizations company dominated when there is no evidence of actual restraint or coercion upon any employee will be decided. Whether a supervisory employee may express a preference if the expression is not shown to have affected any employee will be answered. Whether an employer may discharge an employee because he fails to return to work in accordance with his reinstatement agreement, or within a reasonable time thereafter, without being found guilty of discrimination will be made clear. That such discharge may not be declared unlawful when there is no evidence to contradict the testimony of the person ordering the discharge that had the employee returned in accordance with that agreement he would have been put to work in compliance with its terms, will also be settled. The efficacy of the Constitutional guaranty of free speech will be better understood when your Honorable Court has considered whether words used and acts done which are not shown to have affected any employee in his choice of a bargaining representative are protected by that guaranty. Finally, determination of the issues involved would decide whether an arbitrary and capricious administration of the Act by the Board is violative of the substantive due process guaranteed by the Fifth Amendment to the Constitution for the United States.

It seems clear that the magnitude of the issues and conflicting decisions upon them here presented to your Honorable Court and the importance of final determination to definitely establish a unified rule of law is so vital to the proper and just administration of the Act that your

Honorable Court should grant petitioner's prayer and issue a writ of certiorari to the lower court.

G. THE QUESTIONS PRESENTED TO YOUR HONORABLE COURT HAVE NOT BEEN JUDICIALLY DETERMINED BY YOUR HONORABLE COURT

Petitioner respectfully represents that after due and diligent search of the decided cases it has been unable to find any authoritative decisions decisive of the issues presented to your Honorable Court in the instant case other than those cited in the brief.

Wherefore, your petitioner, having presented to your Honorable Court the foregoing reasons why a writ of certiorari should issue from your Honorable Court, respectfully prays that your Honorable Court issue a writ of certiorari directing the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Honorable Court a full and complete transcript of the record herein to the end that the said cause may be reviewed and determined by your Honorable Court as provided by law, that the judgment and order of the aforesaid Circuit Court of Appeals may be reversed, and that your petitioner may have such further relief as to your Honorable Court may seem just.

Respectfully submitted,
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